



STATE OF NEW YORK

**UNEMPLOYMENT INSURANCE APPEAL BOARD**

PO Box 15126

Albany NY 12212-5126

**DECISION OF THE BOARD**

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Mailed and Filed: JUNE 16, 2022

IN THE MATTER OF:

Appeal Board No. 621149

PRESENT: JUNE F. O'NEILL, MEMBER

In Appeal Board Nos. 621149, 621150 and 621151, the claimant appeals from the decisions of the Administrative Law Judge filed February 2, 2022, insofar as they sustained the initial determinations holding the claimant ineligible to receive benefits, effective September 21, 2020 through February 28, 2021, on the basis that the claimant was not totally unemployed; charging the claimant with an overpayment of \$40.25 in benefits recoverable pursuant to Labor Law §

597 (4), \$2,133.25 in Pandemic Emergency Unemployment Compensation (PEUC) benefits repayable pursuant to § 2107 (e) (2) of the Coronavirus Aid, Relief,

and Economic Security (CARES) Act of 2020, and \$600.00 in Federal Pandemic Unemployment Compensation (FPUC) benefits repayable pursuant to § 2104 (f) (2)

of the Coronavirus Aid, Relief, and Economic Security (CARES) Act of 2020; and reducing the claimant's right to receive future benefits by 136 effective days and charging a civil penalty of \$416.02 on the basis that the claimant made willful misrepresentations to obtain benefits, as modified to reduce the claimant's right to receive future benefits by 72 effective days.

In Appeal Board Nos. 621152, 621153 and 621154, the claimant appeals from the decisions of the Administrative Law Judge filed February 2, 2022, insofar as they sustained the initial determinations holding the claimant ineligible to receive benefits, effective April 18, 2021 through June 20, 2021, on the basis that the claimant was not totally unemployed; charging the claimant with an overpayment of \$321.75 in benefits recoverable pursuant to Labor Law § 597

(4); and reducing the claimant's right to receive future benefits by 48 effective days and charging a civil penalty of \$100.00 on the basis that the claimant made willful misrepresentations to obtain benefits, as modified to charge the claimant with a recoverable overpayment of \$143.00 and reduce the claimant's right to receive future benefits by 24 effective days.

In Appeal Board No. 621155, an appeal by the claimant was processed to the Appeal Board from the decision of the Administrative Law Judge filed February 2, 2022, which overruled the initial determination disqualifying the claimant from receiving benefits, effective June 26, 2021, on the basis that the claimant voluntarily separated from employment without good cause.

At the combined telephone conference hearing before the Administrative Law Judge, all parties were accorded a full opportunity to be heard and testimony was taken. There were appearances by the claimant and on behalf of the employer.

With respect to Appeal Board No. 621155, it now appears that the appeal was processed through inadvertence. Since the Judge's decision in Appeal Board No. 621155 is not adverse to the appellant's interest, the appellant has no standing to appeal from that decision.

Based on the record and testimony in this case, the Board makes the following

**FINDINGS OF FACT:** The claimant worked for the employer as a part time wellness trainer from 2013 through June 20, 2021. He reported his hours of work each day by punching a personal code into the employer's time clock, and the employer paid him by the hour based on these time punches. The employer closed for a while at the onset of the COVID-19 pandemic, and the claimant did not work during that time. He filed a claim for benefits on March 26, 2020.

The claimant returned to work on September 21, 2020. He worked three days per week in the weeks ending September 27 and October 11, 2020. He worked four or more days in the weeks ending October 18, October 25, November 1, November 8, November 15, and November 22, 2020. He did not work during the weeks ending January 3, January 10 and January 17, 2021. During the week ending January 24, 2021, he worked 17.00 hours over the course of four days. During the week ending January 31, 2021, he worked 13.50 hours over the course of three days. During the week ending February 7, 2021, he worked 13.25 hours over the course of three days. During the week ending February 14, 2021, he worked 11.75 hours

over the course of three days. During the week ending February 21, 2021, he worked 11.25 hours over the course of three days. During the week ending February 28, 2021, he worked 15.25 hours over the course of four days.

The claimant filed a new claim on March 28, 2021. He did not work from April 8 through April 18, 2021. He worked 12.00 hours over the course of three days in the week ending April 25, 2021. He worked 11.75 hours over the course of three days in the week ending May 2, 2021, and 11.75 hours over the course of three days in the week ending May 16, 2021. He worked 6.50 hours over the course of two days in the week ending June 20, 2021.

The claimant usually certified for benefits each week, usually online. The claimant would answer a question online that asked, "How many days did you work, including self-employment, during the week ending \_\_\_\_\_?" The webpage provided a dropdown box where the claimant could select the number of days he had worked that week. The claimant certified to working "2" days in the week ending September 27, 2020, and "0" days in each of the weeks ending October 11, October 18, October 25, November 1, November 8, November 15, and November 22, 2020. He also certified to working "0" days in each of the weeks ending January 3, January 10, January 17, 2021.

Starting with his certification for the week ending January 18, 2021, the claimant saw instructions online for certifying to his number of "days" worked based on the number of hours he worked that week. The instructions stated that zero to 10 hours of work should be reported as "0" days, 11-16 hours should be reported as "1" day, 17-21 hours should be reported as "2" days, 22-30 hours should be reported as "3" days, and 31 or more hours should be reported as "4" days. The instructions stated that, in calculating the number of hours worked, a claimant should round up to the nearest whole hour. The claimant certified to working "0" days in each of the weeks ending January 24, January 31, February 7, February 14, February 21, February 28, and June 20, 2021. He certified to working "1" day in each of the weeks ending April 25 and May 2, 2021, and "2" days in the week ending May 16, 2021. He certified to working "0" days in the week ending June 20, 2021.

The claimant received \$80.50 in regular benefits for the week ending September 27, 2020, during which he worked three days and certified to working two days. He received \$2,133.25 in PEUC benefits for days when the Department of Labor contends he worked during the weeks ending October 11, 2020 through February 28, 2021. He received the \$300.00 in FPUC benefits for each of the weeks

ending January 24 and February 28, 2021. He received \$321.75 in regular benefits for days when the Department of Labor contends he worked during the weeks ending April 11, 2021 through June 20, 2021.

OPINION: The credible evidence establishes that the claimant worked three days during the weeks ending September 27 and October 11, 2020, and worked four or more days during the weeks ending October 18, October 25, November 1, November 8, November 15, and November 22, 2020. He worked 17.00 hours in the week ending January 24, 2021, 13.50 hours in the week ending January 31, 2020, 13.25 hours in the week ending February 7, 2021, 11.75 hours in the week ending February 14, 2021, 11.25 hours in the week ending February 21, 2021, and 15.25 hours in the week ending February 28, 2021.

During the period prior to the week ending January 18, 2021, the claimant was not totally unemployed with respect to any day that he worked and any week in which he worked on four or more days. Therefore, he was not totally unemployed with respect to three days during the weeks ending September 27 and October 11, 2020, and from October 12, 2020 through November 22, 2020.

Starting with the week ending January 18, 2021, the Department of Labor instructed claimants to report their "days" of work based on the number of hours they worked that week, rounded up to the nearest whole hour. Zero to 10 hours of work should be reported as "0" days, 11-16 hours should be reported as "1" day, 17-21 hours should be reported as "2" days, 22-30 hours should be reported as "3" days, and 31 or more hours should be reported as "4" days. Based on this guidance, we find that the claimant "worked," and lacked total unemployment with respect to, two days in the week ending January 24, 2021 and one day in each of the weeks ending January 31, February 7, February 14, February 21 and February 28, 2021. A claimant is not eligible for benefits with respect to any day when he lacks total unemployment. Accordingly, we conclude that, with respect to the number of days each week when the claimant was not totally unemployed, the claimant is ineligible for benefits.

As neither the employer nor the Commissioner of Labor has appealed from the Administrative Law Judge's Decision holding that the claimant did not work during the weeks ending April 11 and April 18, 2021, the Judge's Decision continues in effect with respect to those weeks. The credible evidence further establishes that the claimant worked 12.00 hours in the week ending April 25, 2021, 11.75 hours in the week ending May 2, 2021, 11.75 hours in the week ending May 16, 2021, and 6.5 hours in the week ending June 20, 2020. Based on

the Department of Labor's guidance, we find that the claimant is considered to have "worked" one day in each of the weeks ending April 25, May 2 and May 16, 2021 and zero days in the week ending June 20, 2021. Accordingly, we conclude that the claimant lacked total unemployment with respect to one day in each of the weeks ending April 25, May 2 and May 16, 2021, and zero days in the week ending June 20, 2021. A claimant is not eligible for benefits with respect to any day when he lacks total unemployment. Accordingly, we further conclude that the claimant is ineligible for one day of benefits in each of the weeks ending April 25, May 2 and May 16, 2021, but the claimant is eligible for benefits with respect to the entirety of the week ending June 20, 2021.

The credible evidence further establishes that the claimant certified to the Department of Labor that he worked two days in the week ending September 27, 2020, when in fact he worked three days. The claimant's certification was factually false. The claimant received two days of regular benefits, totaling \$80.50, for this week, when in fact he was entitled to only one day of benefits, or \$40.25. The remaining \$40.25 constitutes an overpayment, which is recoverable because of the false certification. Accordingly, we further conclude that the claimant received a recoverable overpayment of \$40.25 with respect to this week.

The credible evidence further establishes that the claimant received \$2,133.25 in PEUC benefits for days when the Department of Labor contends he worked during the weeks ending October 11, 2020 through February 28, 2021. As stated above, we find and conclude that the claimant was ineligible for three days of benefits during the week ending October 11, 2020, and was ineligible for any benefits during the weeks ending October 18, October 25, November 1, November 8, November 15, and November 22, 2020. He also was ineligible with respect to 2 days in the week ending January 24, 2021 and 1 day in each of the weeks ending January 31, February 7, February 14, February 21, and February 28, 2021. Any PEUC benefits paid to the claimant with respect to days when he was ineligible constitute an overpayment. Overpayments of PEUC benefits are automatically recoverable pursuant to federal law. Accordingly, we further conclude that any PEUC benefits paid to the claimant with respect to days when he was ineligible constitute a recoverable overpayment. This matter is referred to the Department of Labor for recalculation of the PEUC overpayment amount.

The credible evidence further establishes that the claimant received \$300.00 in FPUC benefits with respect to each of the weeks ending January 24 and

February 28, 2021. The claimant was ineligible for two days of benefits in the week ending January 24, 2021 and one day of benefits in the week ending February 28, 2021. Therefore, he was eligible for two days of benefits in the week ending January 24, 2021 and three days of benefits for the week ending February 28, 2021. Because he was eligible for partial benefits with respect to these weeks, he also was eligible for FPUC benefits. Accordingly, we further conclude that the FPUC benefits were not overpaid and are not recoverable.

The credible evidence further establishes that the claimant received \$321.75 in regular benefits for days when the Department of Labor contends he worked during the weeks ending April 11, 2021 through June 20, 2021. The Administrative Law Judge held that the claimant did not make any false certification or receive any overpayment with respect to the weeks ending April 11 and April 18, 2021, and the employer and Commissioner of Labor have not appealed from this ruling. Therefore, the Judge's ruling with respect to these weeks continues in effect. With respect to the weeks ending April 25 and May 2, 2021, the claimant certified to working "1" day each week, which was correct based on the Department of Labor's certification instructions. With respect to the week ending May 16, 2021, the claimant certified to working "2" days even though he was only required to report one day of work. With respect to the week ending June 20, 2021, the claimant certified to working "0" days, which again was correct based on the Department of Labor's instructions. Because the claimant did not underreport his days of work, none of these certifications were factually false in such a manner as to result in an overpayment. Accordingly, we further conclude that the claimant did not receive a recoverable overpayment with respect to any of these weeks. We further conclude that, as the claimant's certifications with respect to these weeks were not factually false, these certifications do not constitute willful misrepresentations.

The credible evidence further establishes that the claimant certified to working "2" days during the week ending September 27, 2020, and "0" days during the week ending October 11, 2020, when in fact he worked three days in each of these weeks. He certified to working "0" days in each of the weeks ending October 18, October 25, November 1, November 8, November 15 and November 22, 2020, when in fact he worked four days each week. He also certified to working "0" days in each of the weeks ending January 3, January 10, January 17, 2021, during which he is not alleged to have worked. He certified to working "0" days in the week ending January 24, 2021, when he was

required to report working two days, and he reported working "0" days in each of the weeks ending January 31, February 7, February 14, February 21 and February 28, 2021, when he was required to report working one day each week. As the claimant knew how many days and hours he

worked and also knew how to calculate his "days" of work correctly, his certifications to working fewer days than he was required to report constitute willful misrepresentations. Accordingly, we further conclude that the claimant made willful misrepresentations with respect to the weeks ending September 27, October 11, October 18, October 25, November 1, November 8, November 15 and November 22, 2020, and January 24, January 31, February 7, February 14, February 21 and February 28, 2021, but did not make willful misrepresentations with respect to the weeks ending January 3, January 10, and January 17, 2021. This matter is referred to the Department of Labor for recalculation of the forfeiture penalty and civil monetary penalty.

DECISION: The decisions of the Administrative Law Judge, insofar as appealed from, are modified as follows and, as so modified, are affirmed.

In Appeal Board No. 621149, the initial determination, holding the claimant ineligible to receive benefits, effective September 21, 2020 through February 28, 2021, on the basis that the claimant was not totally unemployed, is modified to be effective three days in the weeks ending September 27 and October 11, 2020; October 12, 2020 through November 22, 2020; two days in the week ending January 24, 2021; and one day in each of the weeks ending January 31, February 7, February 14, February 21 and February 28, 2021, and, as so modified, is sustained.

In Appeal Board No. 621150, the initial determination, charging the claimant with an overpayment of \$40.25 in benefits recoverable pursuant to Labor Law §

597 (4), \$2,133.25 in Pandemic Emergency Unemployment Compensation (PEUC) benefits repayable pursuant to § 2107 (e) (2) of the Coronavirus Aid, Relief,

and Economic Security (CARES) Act of 2020, and \$600.00 in Federal Pandemic Unemployment Compensation (FPUC) benefits repayable pursuant to § 2104 (f) (2)

of the Coronavirus Aid, Relief, and Economic Security (CARES) Act of 2020, is modified to charge the claimant with an overpayment of \$40.25 in benefits recoverable pursuant to Labor Law § 597 (4), and PEUC benefits in an amount to

be recalculated by the Department of Labor, with no recoverable overpayment of FPUC benefits, and as so modified, is sustained. This matter is referred to the Department of Labor for recalculation of the PEUC overpayment.

In Appeal Board No. 621151, the initial determination, reducing the claimant's right to receive future benefits by 136 effective days and charging a civil penalty of \$416.02 on the basis that the claimant made willful misrepresentations to obtain benefits, is modified to be effective with respect to the weeks ending September 27, October 11, October 18, October 25, November 1, November 8, November 15 and November 22, 2020, and January 24, January 31, February 7, February 14, February 21 and February 28, 2021, only. This matter is referred to the Department of Labor for recalculation of the forfeiture penalty and civil monetary penalty.

In Appeal Board No. 621152, the initial determination, holding the claimant ineligible to receive benefits, effective April 18, 2021 through June 20, 2021, on the basis that the claimant was not totally unemployed, is modified to be effective one day each week in the weeks ending April 25, May 2 and May 16, 2021, only, and as so modified, is sustained.

In Appeal Board Nos. 621153 and 621154, the initial determinations, charging the claimant with an overpayment of \$321.75 in benefits recoverable pursuant to Labor Law § 597 (4); and reducing the claimant's right to receive future

benefits by 48 effective days and charging a civil penalty of \$100.00 on the basis that the claimant made willful misrepresentations to obtain benefits, are overruled.

In Appeal Board No. 621155, the appeal is dismissed. The decision in A.L.J. Case No. 321-06789 is continued in effect.

JUNE F. O'NEILL, MEMBER